INDEX

Cases Cited:

Supreme Court of the United States

October Term, 1954

No. .....

BEN SAPIR

Petitioner

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE TENTH CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, BEN SAPIR, respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court, to review the Orders of the United States Court of Appeals for the Tenth Circuit, entered in this case November 17, 1954, modifying the Opinion and Judgment of said Court entered in this case October 20, 1954.

OPINIONS BELOW

There was no Opinion in the District Court. The Opinion of the Court of Appeals (Phillips, Chief Judge, and Huxman and Murrah, Circuit Judges) has not yet been reported but appears in the Record on Certiorari at Pages 159 to 163, and a printed copy thereof is appended to this Petition. No Opinion was rendered upon the Motion to Amend the Opinion and Judgment, nor was any Opinion rendered upon the Petition for Rehearing.

STATEMENT OF JURISDICTION

The Order and Judgment of the Court of Appeals for the Tenth Circuit sought to be reviewed were both dated November 17, 1954, entered on the same date (R. 176).

Time to petition for rehearing was extended to December 1, 1954, by Order dated and entered November 20, 1954 (R. 177). Petition for Rehearing was denied by Order dated and entered December 13, 1954 (R. 181). On December 14, 1954, an Order was entered staying issuance of the Mandate for a period of thirty days from said date (R. 181).

The jurisdiction of this Court is invoked under 28 USC, Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals for the Tenth Circuit, after having reversed petitioner's conviction and entered judgment directing dismissal of the indictment, have power to consider evidence outside of the record, submitted in support of the Government's Motion for an amendment of the Judgment, so as to direct a new trial?

2. If the Court of Appeals for the Tenth Circuit had the power, after entering its Judgment reversing the conviction, to consider evidence outside of the record, was the Government's showing in support of its request for a new trial timely and adequate?

3. After petitioner's conviction was reversed for insufficiency of the evidence and judgment entered by the Court of Appeals for the Tenth Circuit directing dismissal of the indictment, did the Government's application for a new trial, and its production of allegedly newly discovered evidence outside of the record, violate the Fifth Amendment

to the Constitution of the United States prohibiting double jeopardy?

4. Where petitioner moved for judgment of acquittal at the end of the Government's case, under Rule 29 (a) Federal Rules of Criminal Procedure, but did not move for a new trial under Section (b) of said Rule, is the direction of a new trial by the Court of Appeals a proper determination under Title 28 USC, Section 2106, in spite of the finding of the Court of Appeals that the Motion for judgment of acquittal should have been granted?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved, and are quoted herein in full:

Fifth Amendment to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Title 28, USC Section 2106:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the

cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. June 25, 1948, c. 646, 62 Stat. 963."

Rule 29, Federal Rules of Criminal Procedure:

"(a) *Motion for Judgment of Acquittal.* Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

"(b) *Reservation of Decision on Motion.* If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the motion is denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the court may order a new trial or enter judgment of acquittal."

Title 28 USC, Section 1291:

"*Final decisions of district courts*:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of

the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929."

REASONS FOR ALLOWANCE OF THE WRIT

1. Each of the questions presented herein embodies questions of Federal law which have not been but which should be settled by this Court.

2. The decision herein directing a new trial on the basis of newly discovered evidence, outside of the record on appeal, after judgment reversing petitioner's conviction and directing his discharge, departs from the accepted and usual course of judicial proceedings and violates petitioner's rights under the Fifth Amendment to the United States Constitution, in that it places him twice in jeopardy for the same offense.

3. The decision herein is in conflict with the decision of the Ninth Circuit, in *Karn* vs. *United States*, 9th Cir. 158 F. 2d 568, holding that the only proper disposition of an appeal under similar circumstances is to direct the trial court to enter judgment of acquittal.

4. To grant a new trial upon allegedly newly discovered evidence, outside of the record on appeal, after entering judgment directing petitioner's discharge, exceeds the appellate jurisdiction of the Court of Appeals, and so far departs from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision.

5. The decision herein appears to be in conflict with applicable decisions of this Court.

STATEMENT OF THE CASE

The Judgment of the Court of Appeals sought to be reviewed amended its original Judgment directing dismissal of the indictment to direct a new trial (R. 176).

Petitioner was convicted upon the first count of an indictment, charging conspiracy to defraud the United States in violation of 18 U.S.C., Section 371 (R. 5, 10). The conspiracy charged was to avoid payment for a quantity of aluminum purchased by petitioner and being property of the United States (R. 2, 3). Petitioner moved for judgment of acquittal, (R. 5, 117, 120), but no alternative motion for a new trial was submitted to the trial court (R. 9).

The Court of Appeals reversed because the evidence was insufficient to support the verdict in that there was no evidence to show that petitioner knew he was dealing with Government property (R. 159-163).

The original Judgment of the Court of Appeals directed dismissal of the indictment (R. 164). The Government petitioned to amend the Judgment so as to grant a new trial on the ground of newly discovered evidence (R. 165).

Petitioner opposed the request for a new trial (R. 167). Thereafter, the Government filed an ex parte Affidavit, not served upon petitioner's counsel, (R. 169), itemizing the alleged newly discovered evidence. On the basis of said Affidavit the Court of Appeals entered its Order amending its original Judgment and directing a new trial (R. 176). Petition for re-hearing was filed and denied (R. 178, 181). Mandate was stayed pending Petition for Certiorari (R. 181).

Federal jurisdiction in the Court of first instance was based on Title 18, U.S.C. 3231.

ARGUMENT

I.

The Court of Appeals Exceeded Its Jurisdiction

Courts of Appeals are courts of limited jurisdiction. They have only appellate, as distinguished from original, jurisdiction. Title 28 USC 1291. The Government's petition to amend the Judgment so as to direct a new trial in essence was a motion for new trial on the ground of newly discovered evidence. To entertain such a motion and consider in connection therewith evidence outside the record on appeal is the exercise of original and not appellate jurisdiction.

The Court of Appeals for the Tenth Circuit has held that it has no power to pass originally upon a motion for a new trial. *Hall* vs. *United States,* 10th Cir. 78 F. 2d 168 (1938). See also *Heald* vs. *United States,* 10th Cir., 175 F. 2d 878, at 883, (1949). In disposing of an appeal, a Court of Appeals is limited to the record before it and should not consider extraneous statements. *Beeler* vs. *United States,* 5th Cir. 205 F. 2d 454 (1953). *Starke* vs. *New York, Chicago and St. Louis R. Co.,* 7th Cir. 180 F 2d 569 (1950). In basing its disposition of this case upon evidence outside of the record on appeal, the Court of Appeals exceeded its appellate jurisdiction.

II.

The Action of the Court of Appeals in Directing a New Trial Was Legally Erroneous

The Government's petition for a new trial on the basis of newly discovered evidence, after judgment of the Court of Appeals had been entered reversing petitioner's conviction and directing dismissal of the indictment, was not timely,

and the showing in support thereof was legally insufficient to justify direction of a new trial. Assuming for the purpose of this argument that the Court of Appeals had power to entertain the Government's application, its action thereon so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of the supervisory power of this Court. If such a power exists, it should be exercised only in accordance with the established law governing new trials for newly discovered evidence, and only under the most unusual circumstances. *Silva* vs. *United States,* 9th Cir. 38 F. 2d 465 (1930).

The Government's affidavit fails to show when the evidence was discovered, and further fails to show any reasonable excuse for not producing the evidence at the trial. No diligence is shown, and the implications are that diligence was entirely lacking. All of the information relied upon was within the personal knowledge of witnesses who testified at the trial. Petitioner's Motion for acquittal at the conclusion of the Government's case advised the Government of the insufficiency of its evidence (R. 117). Under these circumstances, the showing was insufficient as a matter of law to justify a new trial. *Heald* vs. *United States* (Supra). *Johnson* vs. *United States,* 8th Cir. 32 F. 2d 127 (1929). *Evans* vs. *United States,* 10th Cir. 122 F. 2d 461 (1941). With its extensive facilities and powers for investigating and prosecuting crimes, the Government should be held, at the very least, to the same standards of diligence which the law imposes upon an individual accused.

Under Rule 29 (b), Federal Rules of Criminal Procedure, the primary discretionary responsibility for granting a new trial for newly discovered evidence, or on the record already made, is vested in the trial court. The action of the Court of Appeals in itself directing a new trial deprives the trial court of the exercise of its discretion. See *Cone* vs.

West Virginia Pulp & P. Co. 330 US 212, 91 L Ed 849, 67 S Ct 752. *Wagner vs. United States,* 9th Cir. 118 F. 2d 801 (1941).

III.

Directing a New Trial Under Circumstances of This Kind Violates the Constitutional Prohibition Against Double Jeopardy

In the case of *Bryan vs. United States,* 338 US 552, 94 L Ed 335, 70 S Ct 317 (1949), this Court held that there was no double jeopardy under the Fifth Amendment to the Constitution of the United States upon a second trial, where an accused himself obtains a reversal of his conviction. That case is not controlling here.

In the *Bryan* case the petitioner himself had asked for a new trial and that request for relief was properly pending before the Court of Appeals. In this case no request for a new trial was involved in petitioner's appeal. The Court of Appeals entered Judgment directing dismissal of the indictment on the ground that the evidence was legally insufficient to sustain the conviction and that the trial court should have entered judgment of acquittal. The Order modifying the Judgment so as to direct a new trial was based upon new and additional evidence outside of the record made below. It is submitted that such procedure violates the constitutional prohibition against double jeopardy, and that the question has not been decided by this Court.

Had the jury returned a verdict of acquittal the Government could not have obtained a new trial. Had the trial court entered judgment of acquittal, as it was required by law to do, the Government could not have obtained a new trial. *Ex parte United States,* 7th Cir. 101 F. 2d 870 (1939). To permit the Government to obtain a new trial, on evidence

outside of the record, after the Court of Appeals has rightly decided that the defendant, as a matter of law, should go free, is the equivalent of permitting the Government to obtain a new trial after a judgment of acquittal and, it is submitted, violates the constitutional prohibition against double jeopardy.

IV.

The Direction of a New Trial is Not An Appropriate and Just Judgment Under the Circumstances of This Case

In the *Bryan* case, supra, this Court held that the determination of a case by the Court of Appeals was governed by Title 28 USC, Section 2106, set out in full above. The Court did not in that case reach the question of under what circumstances the judgment of acquittal is warranted or required by said Section.

The decision of the Court of Appeals amending its Judgment and directing a new trial is in conflict with the decision of the Ninth Circuit in the case of *Karn* vs. *United States,* 158 F. 2d 568 (1946), holding that where an accused's right to an acquittal, as a matter of law, had fully matured in the trial Court, the only proper disposition of the appeal was to direct the judgment which the trial Court should have entered. See also *United States* vs. *Gardner,* 7th Cir. 171 F. 2d 753 (1948). *Williams* vs. *United States,* 5th Cir., 216 F. 2d 350 (1954).

The Bryan case is not dispositive here, since in that case petitioner was asking the Court of Appeals for a new trial and the circumstances which made granting a new trial an appropriate judgment, under Section 2106, Title 28 USC, were contained in the record on appeal. In the instant case no motion for a new trial was presented to the District

Court, nor was any such motion by petitioner before the Court of Appeals.

Under Rule 29 (a) Federal Rules of Criminal Procedure, petitioner was entitled to a judgment of acquittal as a matter of law at the close of the Government's case. The Court of Appeals has so held, and the correctness of that holding is not challenged. The only appropriate method of correcting the error was to direct the District Court to enter the judgment which the law required it to enter. The discretion vested in courts of appeals by Section 2106, Title 28 USC is not unlimited, and as indicated by the remarks of Mr. Justice Minton, dissenting in *Johnson* vs. *New York, New Haven & Hartford R. Co.*, 344 US 48, 97 L Ed 77, 73 S Ct 125 (1952), the discretion should be exercised so as to dispose of the case according to law, on the record already made.

The action of the Court of Appeals raises a far more serious issue than the possible guilt of the petitioner. The issue is the proper standard to which the Government should be held in criminal prosecutions, by law and by the courts. To deprive a citizen of his liberty the law places upon the Government the burden of producing evidence legally sufficient to support a conviction. To discharge that burden, the Government is clothed with vast and ever-expanding powers of investigation. The law rightly says that if in any criminal case the Government fails to produce evidence which raises a jury issue, the defendant shall go free. In the absence of any excuse, reasonable or otherwise, for the Government's failure to produce its evidence at the original trial, to grant it another bite would violate fundamental concepts of what is right and fair. Such a disposition would reward and invite laxity, and tend to destroy the high standard of diligence to which the Government should rightly be held. To enforce the law and to sustain the principles upon which it

is based, the only appropriate disposition of this case, under Section 2106, Title 28 USC, was to direct petitioner's discharge.

CONCLUSION

It is respectfully submitted that the Petition should be granted, and the Writ issue.

BEN SAPIR
Petitioner

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United States Court of Appeals

TENTH CIRCUIT.

No. 4912—September Term, 1954.

Ben Sapir, Appellant,

v.

United States of America, Appellee.

Appeal from the United States District Court for the District of New Mexico.

[October 20, 1954.]

John B. Tittmann and T. B. Keleher (A. H. McLeod was with them on the brief) for appellant.

Melvin L. Robins, Asst. U. S. Atty., (Paul F. Larrazolo, U. S. Atty., was with him on the brief) for the United States.

Before Phillips, Chief Judge, and Huxman and Murrah, Circuit Judges.

Phillips, Chief Judge.

Sapir and one Canfield were charged by indictment with a conspiracy to defraud the United States in violation of 18 USCA §371. From a judgment and sentence on a verdict of guilty, Sapir has appealed.

The New Mexico Institute of Mining and Technology, located at Socorro, New Mexico, hereinafter referred to as the

Institute, pursuant to a contract with the United States Navy, was engaged in a research project involving airplane components and missiles. For reasons of military security the contract was "classified." Under the contract, the Institute was possessed of certain property of the United States used in connection with such research program. It was determined that certain aluminum and brass surplus should be sold as scrap. These materials were used in classified experimental work. The aluminum bore marks from which it could be readily recognized as property of the United States. The aluminum was smelted into ingots in order to destroy its identity and in order to make it unrecognizable as property of the United States and to maintain the secrecy of the classified experimental work. Canfield, who was purchasing agent for the Institute, in May, 1953, issued an invitation to bid on the following items: "Aluminum, resmelted, in ingot form" and "Brass, oil radiators, removed from aircraft." The bid form was on the letterhead of the Institute and was the standard form used by the Institute in its ordinary transactions and carried the notation "for sale by the N. M. Institute Mining & Technology, Socorro, N. M." The procedure used in the sale of the scrap was the normal procedure for the sale of property of the Institute. Sapir was the successful bidder. After he had signed the bid and returned it to the Institute, it was approved on May 19, 1953, by Commander J. F. Gill, Development Contract Officer and the Navy representative in charge of the program at the Institute. It was accepted by Canfield, the purchasing agent, on May 25, 1953. Both endorsements were placed on the bid after Sapir had returned it and he had no knowledge that it was approved by anyone other than the Institute. The notice of award of bid, which was sent to Sapir on May 25, 1953, was the regular Insti-

tute form and contained nothing to indicate that the United States was in any way involved in the transaction.

On June 12, 1953, Sapir removed 96,580 pounds of aluminum ingots and 2,998 pounds of brass from the property of the Institute by truck and loaded it into a railroad car. The Institute having no facilities for weighing the aluminum and brass surplus, it was agreed that the items would be paid for on the basis of railroad weights. Pursuant to an agreement between Canfield and Sapir, one truckload was not loaded into the railroad car, but was transported directly by truck from its location on the Institute property to a warehouse in Albuquerque. The following day, Sapir gave Canfield $200. The Institute invoiced Sapir only for the 96,580 pounds of aluminum ingots and 2,998 pounds of brass, which were loaded into the railroad car. Canfield knew that the aluminum ingots and brass belonged to the United States.

An essential element of the offense charged was an intent to defraud the United States.[1] Sapir could not have intended to defraud the United States, unless he knew the property which he purchased belonged to the United States.

The sole question presented on this appeal is whether Sapir knew or had reason to believe that the property which he purchased belonged to the United States, and, therefore, could have intended to defraud the United States through his arrangement with Canfield to transport one truckload of the aluminum and brass directly to Albuquerque and thus avoid it being weighed and invoiced to him. It is manifest from the record that the Institute, at the direction of the representatives of the United States, went to great lengths to conceal the ownership of the property which was the sub-

[1] Salas v. United States, 2 Cir., 234 F. 842, 845;
United States v. Jenks, D.C. Pa., 258 F. 763, 765.

ject matter of the sale. The United States relies upon certain circumstances to establish that Sapir knew the property which he purchased belonged to the United States.

Sapir had a prior purchase transaction with the Institute and he went to one Sweet and requested a refund of part of the purchase price paid. Sweet told Sapir any refund would have to be taken up with Commander Gill or Doctor Workman. Workman was the administrative head of the Institute. Sweet testified that after his conversation with Sapir, "We talked it over with Doctor Workman and Commander Gill and they agreed they would not hold him * * *." But, it is clear from the record that Sapir was not present when the matter was taken up with Commander Gill. Commander Gill testified that he first met Sapir on the day before the trial on the conspiracy charge and there is no evidence in the record that Sapir knew or had reason to believe that Commander Gill was in anywise connected with the sale of the property out of which the conspiracy charges grew.

The materials which were the subject matter of the sale were not materials ordinarily handled by the Institute. However, it is apparent that the Institute made two sales of such materials and in both transactions handled the property as if it were its own.

Of course, the research program and the sale of the materials were not normal activities of the Institute. But, it was a school of mines, and research, with respect to metals and metal products and the accumulation of metal scrap, was not so foreign to its normal functions as to lead a reasonable person to believe, under the circumstances surrounding the sale, that the materials did not belong to the Institute.

On the day that Sapir loaded the materials, an official United States Navy truck with the markings "U.S.N. 94-16278" was parked nearby. But, there was no evidence that Sapir had any knowledge that the truck was in anywise used in connection with the property sold.

The Institute had no facilities for weighing the materials and from that circumstance it is sought to draw the inference that the sale of the property to Sapir was not a normal activity of the Institute.

On July 29, 1953, an FBI agent talked with Sapir. Sapir asked the agent, "What is your interest in the case?" The agent replied that property of the United States was involved in the investigation. Sapir then stated, "I remember the deal. It is a closed case, is it not?" However, that conversation occurred long after the alleged conspiracy had been consummated.

It is well settled that an inference cannot be predicated upon another inference. Presumption cannot be superimposed upon presumption to reach a factual conclusion[2]

In order to warrant a judgment of conviction on circumstantial evidence, the facts and circumstances shown must be consistent with each other and with defendant's guilt and inconsistent with any reasonable theory of innocence.[3]

We are of the opinion that the proven circumstances, either separately or in their totality, were insufficient to warrant the jury in finding beyond a reasonable doubt that Sapir knew or had reason to believe that the property which was the subject matter of the sale belonged to the United States. Accordingly, we conclude that the evidence did not

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[2]Rosenberg v. United States, 10 Cir., 120 F.2d 935, 937.
[3]Morgan v. United States, 10 Cir., 159 F.2d 85, 87.

establish an essential element of the offense charged and that the trial court erred in not sustaining the motion of Sapir for a directed verdict of not guilty and should have sustained the motion of Sapir for a judgment of acquittal notwithstanding the verdict.

The judgment is reversed and the cause remanded, with instructions to dismiss the indictment.